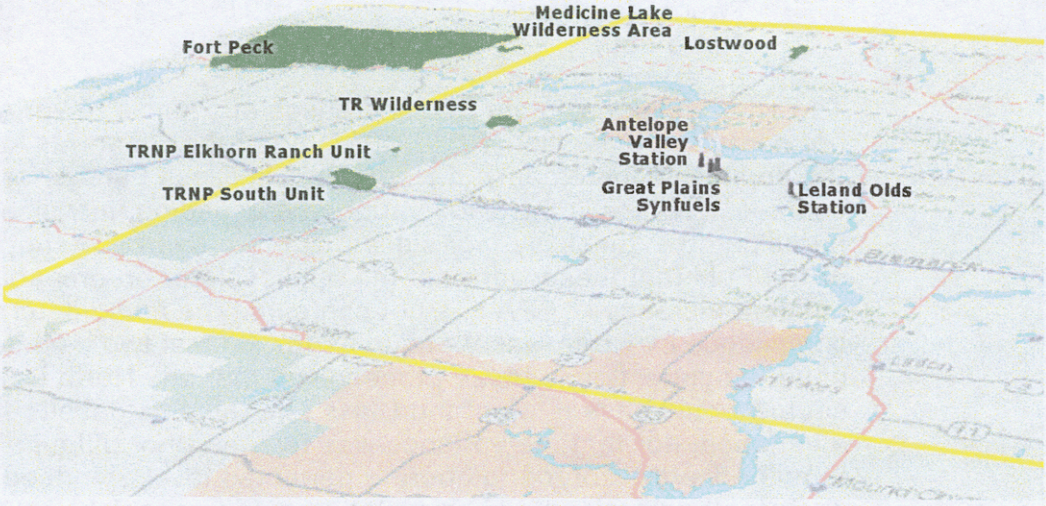

Map 4

The combination of increment expansion, stable or declining total SO2 emissions for the past decade, and significant decreases in emissions from sources nearest the Class I areas further corroborate the conclusion suggested by the downward trend in monitored SO2 emissions in Class I areas and the absence of any observed or predicted adverse impacts on AQRVs: there is no justification for a SIP revision or associated modeling at this time.

F. EPA's Position that variances granted to North Dakota sources are not effective is not legally sound and provides no reasonable basis for a SIP call proceeding.

The major sources in North Dakota have had their permitted, allowable emissions reviewed on several occasions for effects on North Dakota's Class I areas. Where necessary, due to model-predicted exceedances of the Class I increment, the Federal Land Manager has made findings of no adverse impact on air quality related values in Class I areas. Therefore, the major sources in North Dakota currently have valid, existing permits for their allowable emissions, with variances granted during permitting as required by the Clean Air Act, the most recent in 1993 (discussed above in section I.C.). In the case of North Dakota variances, the sources also were required to demonstrate that their ongoing, allowable emissions would not exceed the alternative maximum allowable ambient increases that apply to variance sources. These alternative maximums are as follows for SO2:

	Micrograms per cubic meter
Annual	20
Twenty-four hour	91
Three-hour	325

The alternative maximum SO2 increases applicable to variance sources are contained in section 165(d)(2)(C)(iv) of the Clean Air Act. They are the applicable increments in North Dakota Class I areas for variance sources. Neither in the 1982 variance proceeding, in which EPA participated extensively, nor since has there been any suggestion by EPA or the FLM that these were not the applicable or enforceable maximum ambient increases. EPA has not contested the many determinations of compliance by North Dakota sources for the last two decades. There was never a suggestion in these proceedings that any North Dakota variance source would have to meet the Class I increments despite the granting of a variance, nor that the variance was temporary or ultimately ineffective to authorize the source to operate permitted levels. Indeed, had those positions been raised and prevailed, the sources might not have been permitted, for in each case it was determined that even with Best Available Control Technology installed, the source could not meet the Class I SO2 increments. In fairness and equity, those positions should have been raised, and the sources should have had an opportunity to have them resolved, before they were built, not 20 years afterward. In the case of each permit issued to a source for which a variance was issued using MESOPUFF, EPA was required to issue its written approval.

Nonetheless, for the first time, and in response to an abandoned minor change in a permit, EPA has written to NDDH that even though variances were granted for certain sources, and even though they have been found not to affect adversely air quality related values in those areas and to meet the alternative increments, the Class I SO2 increments must still be met. EPA Region 8 Air and Radiation Program Director Richard R. Long states in his letter of February 1, 2000 to Mr. Jeff Burgess of NDDH that:

> " . . . the State is still required to correct the Class I increment , which could be accomplished by obtaining reductions from other increment-consuming sources or by expanding the increment through reductions in emissions from baseline sources."

The only legal authority cited for this extraordinary departure from two decades of interpretation and practice, is an inconclusive passage from a court decision that does not address the issue. EPA's Mr. Long states that:

> "The Alabama Power Court Decision explains that, although the Class I variance does treat the applicable PSD source with special consideration, the 'totality of facilities . . . may be subject to

> measures necessary to cope with a condition of pollutants exceeding the PSD maximum.' . . .Thus although the FLMs granted variances for these PSD facilities, the State should have revised the SIP to correct the increment violations. Alternatively, EPA could have issued a call for a SIP revision pursuant to 40 CFR 51.166(a)(3), which we still could do."

The most obvious and apparent defect of this analysis is that the passage cited makes reference to the "PSD maximum" not to the Class I increment. When a variance has been granted, the "PSD maximums" are the alternative maximum allowable increases contained in Section (165)(d)(2)(C)(iv) of the CAA. More fundamentally, the quotation from the *Alabama Power* case is taken out of context. The Court decided merely that the Act does contain authority to require protection of applicable increments. Its decision cannot be read to mean the maximum increases in section 165(d)(2)(C)(iv) do not apply to variance sources, as provided by the statute. Basin Electric has no quarrel with the enforceability of the alternative maximums, through a SIP call if necessary, but believes the statute is plain on its face that those are allowable increases applicable here.

EPA's position on this issue is of such fundamental importance to the actions it mandates of NDDH, that it should be resolved prior to undertaking any further proceedings. The authority EPA has cited for its fundamental departure from past interpretation and practice is not applicable, and does not support its position. The EPA position appears to have been given a most cursory and casual level of consideration, certainly not one sufficient to trigger proceedings costing private parties and the states millions of dollars and potentially leading to hundreds of millions of additional control costs. According to EPA's Mr. Long, the entire basis for EPA's determination is that:

> "We've done some research on this issue and discussed the topic with OGC [Office of General Counsel], and we believe the Class I increment still applies in these areas for all of these facilities."

A legal issue of this import should be resolved after careful briefing and discussion by all of those involved at the highest levels of the agencies involved. That has not been done and needs to be done here.

Section 165(d) of the Clean Air Act makes clear that the Class I SO2 increments are not the final determinant for Federal Land Manager, EPA or state action, or SIP calls. That section provides that permits may be denied even when the Class I increment is met, and may be granted even when it is not met, as well as providing alternative allowable maximum ambient increases when variances are granted. EPA has provided no sufficient explanation as to how and why the Class I increments must still be enforced in these circumstances.

Because Dakota Gasification Company's Great Plains Synfuels plant is a source that has been granted a variance, the subject of the validity and effect of variances, and of EPA's position, is discussed in more detail in DGC's response to NDDH's request for information. The comments of DGC in its letter to NDDH of this same date are incorporated herein and made part hereof by this reference.

G. There is no regulatory action pending that requires a current re-evaluation of impacts on Class I increments.

The minor regulatory matter that triggered NDDH's preliminary draft Calpuff modeling effort is no longer pending. As noted in section I.B., that modeling was incomplete, had many limitations, much missing data, required compromises due to computer capacity, used a nonguideline model, and made numerous modifications, including writing many new programs to that model, without notice or opportunity for hearing. The source involved commented that the model had been used beyond its specifications.

If the regulatory matter had not been withdrawn, the modeling issues might have been resolved. NDDH could have decided, after notice and opportunity for comment and hearing, that the MESOPUFF modeling that had already determined Class I increment exceedances and served as the basis for the granting of variances and permits should be discarded in favor of a new and better model, that also predicted similar exceedances. The issue would in due course have been presented to the Federal Land Manager to determine whether there was an adverse effect on air quality related values and a variance would either have been granted or denied. Based on the trends in measured SO2 in the Class I areas, and the trends in minor source and major source emissions, there appears to be no reason to think that the FLM would not grant the variance.

It is inadvisable to initiate a major regulatory proceeding, the equivalent of a SIP call, when there is no regulatory action pending that requires it.

H. A Proceeding to Protect the Class I Increments is Unwarranted Factually or Legally.

The legal basis cited by EPA for its SIP call is 40 C.F.R. 51.166(a)(3):

> "*Required Plan Revision.* If the State or the Administrator determines that a plan is substantially inadequate to prevent significant deterioration or that an applicable increment is being violated, the plan shall be revised to correct the inadequacy or the violation."

By its own terms, this provision requires action only "to prevent significant deterioration" or if "an applicable increment is violated." The applicable increment in the case of the major sources that have received variances

from the Class I increment are the alternative maximum allowable increases contained in section 165(d)(C)(iv) of the Clean Air Act (Part C, Prevention of Significant Deterioration), in 40 C.F.R. 52.21(p)(5), and in NDAC 35-15-15-01.4.j.(4)(b). There is no contention that these applicable maximums have been exceeded; therefore, there is no legal basis to proceed under this section.

40 C.F.R. 51.166(a)(3) has no counterpart in the Clean Air Act itself. It resulted from the decision in the *Alabama Power* case that the agencies involved had some undefined authority to protect the applicable increments. This power has, as best we can determine, never been applied by EPA since its creation in 1980. To the best of our knowledge, EPA has only threatened to make a purported increment exceedance SIP call in two instances: once in Wyoming's Powder River Basin and once in Texas' Houston Ship Channel. In both instances, the threat of SIP call was withdrawn, and the proceeding never took place.

No rules or procedures have been developed for implementing the very bare bones of 40 C.F.R. 51.166(a)(3). It is evident from the terms of that section that it must arise from a "determination" by the state or EPA. In this case, there is nothing more than a letter from EPA based on preliminary NDDH nonguideline draft modeling. There has been no determination by the Administrator of EPA or even the Regional Administrator of EPA. There has been no determination by the head of the NDDH. There have been no proceedings allowing anyone outside the agency to examine the basis for the "determination" that has not yet been made. There are, in short, many problems presented before 40 C.F.R. 51.166(a)(3) could result in a proceeding to require further control strategies, and certainly no basis for assuming at this point that increment "violations" have been established and that hearings should be limited to refining the modeling to allow the adoption of appropriate control strategies, as urged by EPA in its March 28, 2001 letter to NDDH.

I. **Summary.** An examination of air quality data and trends in North Dakota leads to the conclusion that there is no substantial basis for determining that the applicable SO2 increments in North Dakota Class I areas have been exceeded, nor is there good reason for undertaking a modeling proceeding to determine whether the increment is exceeded in North Dakota Class I areas. Basin Electric submits that such a proceeding is unjustified and unnecessary for the following reasons:

- Exceedances of the Class I SO2 increments in North Dakota Class I areas were determined nearly twenty years ago. All North Dakota sources have been properly permitted on that basis since then.

- Appropriate findings of no adverse effect on air quality related values and no exceedance of the alternative

applicable increments have been made by the Federal Land Manager for the predicted Class I SO2 increment exceedances in the case of each North Dakota PSD permit issued since 1982 for sources affecting those areas.

- Ambient SO2 measured levels in Theodore Roosevelt National Park North and South Units since the last finding of no adverse effects on those Units in 1993 have remained stable or declined.

- Emission levels from minor sources (oil & gas) in proximity to the North Dakota Class I areas have decreased significantly since 1993.

- The allowable SO2 emissions from major North Dakota sources have not increased since the FLM determined that they would have no effect on North Dakota Class I areas.

- Several major grandfathered North Dakota sources have ceased or curtailed operation, expanding available SO2 increment.

- Preliminary, draft, nonguideline, modified Calpuff modeling, for a regulatory action that has been withdrawn, does not provide a sufficient basis for undertaking a SIP call based on Class I increment exceedance. The EPA-approved North Dakota SIP does not allow the use of such a model for such a purpose, and would require notice and opportunity for public comment prior to its use.

No substantial basis has been put forward by EPA for its new legal position that variances are not valid. The modeling does not show exceedances of the applicable alternative increments. On the basis of this evidence, Basin Electric submits that NDDH should carefully and thoroughly weigh whether there is a sufficient technical or legal basis for undertaking further proceedings, and whether a need has been demonstrated for revision of its SIP under 40 C.F.R. 51.166(a)(3).

II. The Decision on Whether to Initiate a Proceeding Based on Possible Increment Exceedance is First and Primarily a State Decision. Such a decision can be reversed by EPA only if EPA can demonstrate that it is clearly erroneous, arbitrary or capricious.

Section 101 of the Clean Air Act, from which the D.C. District Court mandated the PSD program, states:

> "that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the